

Letter of Findings Number: 04-20110134
Use Tax
For Tax Years 2007-09

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ISSUE

I. Use Tax—Temporary Storage.

Authority: Miles, Inc. v. Indiana Dep't of Revenue, 659 N.E.2d 1158, 1163 (Ind. Tax Ct. 1995); IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-8.1-5-1; [45 IAC 2.2-3-4](#).

Taxpayer protests the imposition of use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation doing business in Indiana and across the country. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not paid use tax on some items it used out of its inventory as promotional items. The Department therefore issued proposed assessments for use tax and interest. Taxpayer protests that the items in question were not taxable since they were only temporarily stored in Indiana for subsequent use outside Indiana and that it does not owe use tax on those items. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Use Tax—Temporary Storage.

DISCUSSION

Taxpayer protests the imposition of use tax on items it manufactured and then pulled out of its inventory in Indiana for use as promotional items in other states. Taxpayer does not protest items pulled out of Indiana inventory and used at Indiana locations. Taxpayer believes that the items used at out-of-state locations are non-taxable since they were only temporarily stored in Indiana for subsequent use outside Indiana. The Department notes that the burden of proving a proposed assessment wrong rests with the person against whom the proposed assessment is made, as provided by IC § 6-8.1-5-1(c).

The sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The use tax is imposed under IC § 6-2.5-3-2(a), which states:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Also, [45 IAC 2.2-3-4](#) provides:

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when tangible personal property is acquired in a retail transaction and is stored, used, or consumed in Indiana, Indiana use tax is due if sales tax has not been paid at the point of purchase. In this case, the Department determined that Taxpayer had acquired tangible personal property in retail transactions and used that property, via storage, in Indiana without paying sales tax at the point of purchase. The Department therefore issued proposed assessments for use tax, as provided by [45 IAC 2.2-3-4](#).

Also of relevance is IC § 6-2.5-3-1(b), which states:

"Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.

Taxpayer concludes that this definition and its use of the promotional items in question outside of Indiana mean that it does not "store" the promotional items in Indiana. Taxpayer also refers to the Indiana Tax Court case Miles, Inc. v. Indiana Dep't of Revenue, 659 N.E.2d 1158, 1163 (Ind. Tax Ct. 1995), which states:

Miles argues that its promotional materials are excepted from use tax under the definition of "storage."

"Storage" is defined as "the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana." I.C. 6-2.5-3-1(b) (Emphasis added).

The Department argues that the promotional materials are taxable under the definition of "use." "Use" is defined as "the exercise of any right or power of ownership over tangible personal property." I.C. 6-2.5-3-1(a). Specifically, the Department contends that "Miles is liable for use tax because its storage of the promotional

items in, and withdrawal of them from, its Indiana warehouses constitute the exercise of a right or power of ownership over them."

(Emphasis in original).

The court also added:

Miles is correct. This Court has previously held that the storage exception limits and qualifies the meaning of "use." *USAir, Inc. v. Indiana Dep't of State Revenue* (1993), Ind. Tax, 623 N.E.2d 466, 470. If property is stored in Indiana for subsequent use outside Indiana, then the activities of storing, handling, and transporting the property cannot be taxed as "uses." *Id.* To hold otherwise would subsume "storage" within "use," and nullify the exception for subsequent use outside Indiana.

Id., at 1164.

At hearing, Taxpayer provided additional explanation and documentation supporting its position that the product under protest is shipped to sales staff outside Indiana for use outside Indiana. The product is consumed in the course of demonstrations at those non-Indiana locations. The products do not return to Indiana. As provided by the court in *Miles*, this is temporary storage for use outside Indiana and does not constitute storage subject to Indiana use tax under IC § 6-2.5-3-1(b). Both Taxpayer and the Department are in agreement that any product shipped to sales staff in Indiana and consumed in demonstrations in Indiana do constitute Indiana use and those amounts of Taxpayer's product withdrawn from inventory are subject to Indiana use tax. Still, regarding the amounts of product withdrawn from Taxpayer's inventory and shipped to out-of-state locations, Taxpayer has met its burden under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is sustained.

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